

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: Chapter 11  
W.R. Grace & Co., et al.,  
Debtor(s). Bankruptcy #01-01139 (JKF)

Wilmington, DE  
April 28, 2003  
12:00 p.m.

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For The Debtor: Paula A. Galbraith, Esq.  
Pachulski, Stang, Ziehl,  
Young, Jones & Weintraub  
919 North Market Street  
Wilmington, DE 19801

(Via telephone) Janet S. Baer, Esq.  
Kirkland & Ellis  
200 E. Randolph Drive  
Chicago, IL 60601

For Reaud, Morgan & Quinn: Sandy L. Esserman, Esq.  
Stutzman, Bromberg, Esserman  
& Plifka  
2323 Bryan Street-Suite 2200  
Dallas TX 75201

(Via telephone)

For Equity Security Holders: Rhonda P. Thomas, Esq.  
Committee Klett, Rooney, Lieber  
& Schorling  
Two Logan Square-12th Fl.  
Philadelphia, PA 19103

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 For Asbestos PT Committee: Marla Eskin, Esq.  
Campbell & Levine, LLC  
2 1201 North Market St.-Ste. 1501  
Wilmington, DE 19801

3 For Asbestos PD Committee: Theodore J. Tacconelli, Esq.  
4 Ferry, Joseph & Pearce, PA  
824 Market Street  
5 Wilmington, DE 19899

6 For Trade Committee: Michael Lastowski, Esq.  
Duane Morris, LLP  
7 1100 N. Market St.-Ste. 1200  
Wilmington, DE 19801

8 For ACE: Linda M. Carmichael, Esq.  
9 White & Williams  
824 N. Market Street-Ste. 902  
10 Wilmington, DE 19801

11 For National Union: Richard Palacio, Esq.  
Ashby & Geddes  
12 222 Delaware Ave.-17th Fl.  
Wilmington, DE 19899

13 (Via telephone) Michael S. Davis, Esq.  
14 Zeichner, Ellman & Krause, LLP  
575 Lexington Ave.  
15 New York, NY 10022

16 Audio Operator: Sherry Scaruzzi

17 Transcribing Firm: Writer's Cramp, Inc.  
6 Norton Rd.  
18 Monmouth Jct., NJ 08852  
732-329-0191

19 Proceedings recorded by electronic sound recording, transcript  
20 produced by transcription service.

21

22

23

24

25

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 THE COURT: You can be seated. I'm sorry. The next  
2 matter is W.R. Grace, 01-1139.

3 (Attorneys telephonically connected)

4 THE COURT: Good morning. This is the matter of W.R.  
5 Grace. Will all of you on the phone please put your mute  
6 buttons on until you speak, and when you do speak, identify  
7 yourself and your client for the record please. Good morning.

8 MS. GALBRAITH: Good morning, Your Honor, Paula  
9 Galbraith from Pachulski, Stang, Ziehl, Young, Jones &  
10 Weintraub for the Debtors. Also on the phone is my co-counsel,  
11 Janet Baer, from Kirkland & Ellis. Your Honor, I'd like to be  
12 sure that you've received a copy of the amended agenda that was  
13 filed last Thursday.

14 THE COURT: Well, I have one. It doesn't have a  
15 filing date on it so I don't know --

16 MS. GALBRAITH: It's the --

17 THE COURT: if I do.

18 MS. GALBRAITH: -- amended notice.

19 THE COURT: Yes, I have one.

20 MS. GALBRAITH: Your Honor, as set forth on the  
21 amended notice, there's only one matter going forward today,  
22 #4. I've been -- I understand that all the parties are on the  
23 telephone. I'd like to, at this point in time, pass the matter  
24 over to Mr. Esserman representing Reaud, Morgan & Quinn and  
25 Environmental Litigation Group.

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732 329-0191

1 THE COURT: All right. Mr. Esserman?

2 MR. ESSERMAN: Yes, Your Honor, this is Sandy  
3 Esserman on behalf of Reaud, Morgan & Quinn. I'll be making a  
4 brief presentation this morning. This is a discovery matter in  
5 this case, which is an adversary proceeding involving the  
6 Debtor and National Union Fire Insurance. National Union  
7 issued some bonds to protect a settlement that was reached in  
8 Texas and in Alabama. In Texas with Reaud, Morgan & Quinn and  
9 in Alabama with Environmental Litigation Group, who I also  
10 represent. The amounts of the settlements were 21 million in  
11 Texas and 59 million in Alabama. They were to be paid in three  
12 installments. They were secured by the bond issued by National  
13 Union. The final installment was due on January 15th of '03.  
14 Pending in the case is a Motion for Summary Judgment on behalf  
15 of National Union.

16 National Union has adopted three -- or filed three  
17 affidavits in connection with their Motion for Summary  
18 Judgment; the first being a Mr. Kelly, who's a claims adjuster,  
19 the second being Jay Hughes, who is W.R. Grace -- with W.R.  
20 Grace and was involved in the negotiation of the settlement  
21 agreements, the third being Dr. Barrett. We are seeking -- and  
22 the reason for the discovery conference is we are seeking  
23 depositions of all those parties at a 30(b)(6) deponent for  
24 National Union. The only deponent who National Union has  
25 agreed or the Debtor has agreed to produce is Mr. Kelly. They

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 have not agreed to produce Mr. Hughes, Mr. Barrett, or  
2 30(b)(6). We're not under any particular time frame and our  
3 response of Environmental Litigation Group and Reaud, Morgan &  
4 Quinn Firm is not due until June 25th of '03.

5 The parties, just for the record, have been very  
6 cooperative, very civil, and we certainly all understand that  
7 discovery disputes are to be kept out of the Court, if at all  
8 possible, and we bring this to you only reluctantly. Again,  
9 the parties have been very accommodating to one another on  
10 scheduling dates and the like. But in our view, there are two  
11 issues; one, we would like to bring our own Motion for Summary  
12 Judgment, and we of course need to defend the Motion for  
13 Summary Judgment that's filed against us. In that connection,  
14 there has been an agreement to depose Mr. Kelly, but there has  
15 been no agreement on the production of Mr. Hughes, Mr. Barrett,  
16 or a 30(b)(6). We would like to take these depositions, both  
17 in connection with the Motion for Summary Judgment filed by  
18 National Union and in connection with our own deposition.  
19 Alternatively, if Mr. Hughes and Mr. Barrett are not going to  
20 be offered for deposition, we've suggested that perhaps their  
21 affidavits ought to be withdrawn in connection with the Summary  
22 Judgment.

23 A brief recitation on what we believe the law to be in the  
24 Third Circuit, and I'll turn it over to my colleagues at  
25 National Union and the Debtor. We believe the 3rd Circuit,

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 when deciding Summary Judgment Motions, does allow and requires  
2 pertinent discovery requests that are unanswered by a party to  
3 be responded to prior to the time the Motion for Summary  
4 Judgement's heard. That 3rd Circuit case is Sames vs. Gable,  
5 732 Fed.2d, 49. Secondly, the case that we also think is  
6 instructive is the 3rd Circuit case called Miller vs.  
7 Beneficial Management, at 977 Fed.2d 834 at 845. In that case  
8 the 3rd Circuit found it was error to grant summary judgment  
9 where none of the people with knowledge of the facts at issue  
10 had been deposed. The next case we would call the Court's  
11 attention to is an Illinois case out of the District in Allen  
12 vs. Bakelite Products. It's a 2001 U.S. District Lexus 11354,  
13 it's 11354. It's where summary judgment affidavits have been  
14 stricken where the opposing party has not had the opportunity  
15 to depose the affiant. The next case we'd like to cite is a  
16 2nd Circuit case, which is Flairily vs. Cogland and that's at  
17 1713 Fed.2d 10, where there are some statements by the 2nd  
18 Circuit. The Courts agree that summary judgment's improper  
19 where the party opposing the motion has been denied relevant  
20 discovery. There are other cases similar line. We certainly  
21 would either like to take discovery of the deponent, we've got  
22 time to do it, both in connection with their summary judgment  
23 and with our summary judgment. Alternatively, we'd like the  
24 affidavits withdrawn. Thank you.

25 THE COURT: All right, does the Debtor want to put

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 anything on record with respect to this issue?

2 MS. BAER: Your Honor, Janet Baer on behalf of the  
3 Debtor. Only with respect to Mr. Hughes' affidavit. Your  
4 Honor, the affidavit of Jay Hughes is cited in National Union's  
5 Motion. This is an affidavit that the Debtor actually filed  
6 when it commenced this adversary proceeding well over a year  
7 ago. National Union only cites the Hughes affidavit for two  
8 things. Number one, it cites the Hughes affidavit with respect  
9 to background of how these protocols were put into place, what  
10 the settlement was all about. The second thing that National  
11 Union cites the Hughes affidavit for has to do with essentially  
12 a couple sentences in the Hughes affidavit where Mr. Hughes  
13 indicates that the Texas protocol was not met and therefore the  
14 obligation to pay under the protocol has not yet arisen.

15 Your Honor, the Hughes affidavit and those statements are  
16 based on information provided to Grace by Reaud, Morgan & Quinn  
17 as part of the settlement procedure. It seems to me that in  
18 this circumstance, deposing Mr. Hughes would be unnecessary and  
19 quite premature. All he has done is taken their information  
20 and drawn his own conclusions on this one issue. He did supply  
21 a letter to Reaud, Morgan & Quinn when he drew that conclusion  
22 indicating to them that he did not believe the appropriate  
23 claims were submitted because the claims submitted were not  
24 eligible to be counted having had something to do with prior  
25 settlements. That's the only thing that is cited. It's the

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 only reason Mr. Hughes' affidavit is cited. And again, Your  
2 Honor, under Rule 56(e) on a Motion for Summary Judgment, if  
3 Reaud, Morgan & Quinn does not believe that Mr. Hughes is  
4 drawing the appropriate conclusions from their information, it  
5 seems to me the answer to that, and the way to respond to the  
6 Summary Judgment Motion and to file their own motion would be  
7 to simply provide a counter-affidavit. W.R. Grace does not see  
8 why Mr. Hughes' affidavit I'm sorry, why Mr. Hughes'  
9 deposition would be necessary at this time.

10 THE COURT: All right, anyone else wish to --

11 MR. DAVIS: Your Honor, Michael Davis for National  
12 Union. I think this is very much a tempest in a teapot, and I  
13 think the three affidavits -- or rather the three witnesses  
14 being sought after be separated one at a time. I think Ms.  
15 Baer has well identified that there's nothing of substance  
16 being taken from Mr. Hughes' affidavit that's potentially in  
17 dispute, and I would only add one other comment about it and  
18 that is what he is providing in the way of information other  
19 than the documents which make up the case and he authenticates  
20 the documents, and I'm sure there's no dispute as to that, is  
21 he provides a tabulation, a quantity. And we don't believe  
22 that any disagreement as to that tabulation or quantity, but  
23 just in case there might be, we had our Mr. Kelly do the  
24 identical tabulations, and we are offering him as a deposition  
25 witness so that there would be no dispute about the tabulation

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191



1 of quantities. So that we think Mr. Hughes has nothing  
2 meaningful to contribute, and the correct answer is simply to  
3 realize in her Summary Judgment Motion that all we're really  
4 putting Mr. Hughes up for is as the source of these tabulated  
5 quantities and as the validator of the documents that make up  
6 the transaction.

7 I think it's also worth noting, by the way, that National  
8 Union is not the Plaintiff in this adversary proceeding. This  
9 adversary proceeding was commenced by the Debtor to prevent  
10 National Union from paying on these bonds. And National Union  
11 cannot pay on these bonds and have its rights of recoveries in  
12 tact if it pays on them when it doesn't owe on them. And since  
13 the Debtor commenced this proceeding, telling us we don't owe  
14 on these bonds, we have -- it's very important to us that we  
15 make sure that's properly ruled on before we do make any  
16 payment, if we make any payment. And we've come to believe  
17 that the Debtors' arguments as to why these bonds need not be  
18 paid are quite correct.

19 And it may be helpful to have an understanding of what  
20 that argument is. Each of the agreements that we bonded  
21 requires that submissions be made in aggregate amounts. In  
22 other words, you make a submission of say \$10 million. Well,  
23 we don't pay it. And when I say we, I really mean Grace. If  
24 the submission is not in the full aggregate amount, then Grace  
25 has no obligation. If Grace has no obligation, then the surety

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 has no obligation. So all that's at stake here is the  
2 tabulation of when these amounts were submitted, how much they  
3 add up to, and then the question is does the contract mean what  
4 it says. And we think that's entirely susceptible to summary  
5 judgment and that's why we filed that Motion.

6 The second witness that they wish to depose that we're  
7 opposing is Dr. Barrett. Dr. Barrett is -- his affidavit is  
8 not offered in connection with the Summary Judgment Motion.  
9 His affidavit is offered in connection with the alternative  
10 request for relief. The alternative request for relief is that  
11 in the event summary judgment is not granted, then it would be  
12 necessary to adjudicate the medical status of the various  
13 claimants in order to know whether they truly are entitled to  
14 payment. And Dr. Barrett has offered an affidavit to point out  
15 that there is room for disagreement in that regard. So what is  
16 our ultimate request for relief? Our ultimate request for  
17 relief is actually very simple. It's simply that the pending  
18 matter before Judge Woland, identified as the personal injury  
19 procedures litigation, be conducted and concluded before this  
20 Court undertake a separate adjudication concerning these  
21 claimants. And we only offered Dr. Barrett's affidavit to  
22 point out that there are issues. We're not asking this Court  
23 to rule on those issues at all. And so his affidavit and his  
24 deposition would serve no purpose in terms of the Summary  
25 Judgment Motion, and we think it's truly an unusual imposition

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 on a busy practicing physician to ask him to sit for a  
2 deposition when the only issue that he's addressing is  
3 scheduling. And that's all he's doing. His affidavit is  
4 offered for the purpose of suggesting a method of scheduling  
5 this litigation.

6 The third witness that's been requested is a 30(b)(6)  
7 witness of National Union. And National Union is a surety.  
8 What National Union did is it provided its guaranty with  
9 respect to these transactions. We're not denying their  
10 obligation under the bond. The issue we've raised -- and I  
11 should point out, we didn't raise this issue, the Debtor did.  
12 The issue the Debtor raised is does the Debtor owe the money  
13 that we guaranteed. That's the only issue before this Court.  
14 Does the Debtor owe the money that is covered by our bond? And  
15 if the answer to that is no, then the bond doesn't pay; if the  
16 answer to that is yes, then the bond does pay. We haven't put  
17 up any issues concerning National Union, its bond, its  
18 transactions, its events, its circumstances. There's just  
19 the 30(b)(6) witness request from National Union's -- in the  
20 face of the Summary Judgment Motion it goes to the underlying  
21 transaction. It strikes us as utterly pointless.

22 THE COURT: Mr. Esserman?

23 MR. ESSERMAN: Yes, Your Honor, I'd like to briefly  
24 respond to both Mr. Davis and Mr. Baer. We think, to the  
25 extent that the Hughes affidavit is only cited to prove up

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732 329-0191

1 documents, I think Mr. Davis correctly stated, those are not in  
2 dispute. But we think that their affidavit is being used for  
3 more than that, and in fact, he has processed information and  
4 he's come to certain conclusions. We think we're entitled to  
5 test those conclusions and see, in fact, what in the  
6 submissions that he reviewed would lead him to draw such  
7 conclusions, because we believe such conclusions are in error  
8 and I think we're allowed to test that.

9 With regard to the affidavit of Dr. Barrett, I think if  
10 Dr. Barrett's affidavit is not to be considered in connection  
11 with the Motion for Summary Judgment, it ought to be withdrawn;  
12 either that or we ought to be allowed to test his presumptions  
13 in his affidavit. I think that there's a good chance Dr.  
14 Barrett's affidavit will be deemed by the Court to be  
15 irrelevant because the standards for submissions have been set  
16 pre-petition, have been set in the contracts and by the  
17 parties. Nevertheless, it's being offered, and it's certainly,  
18 I think, subject to contest.

19 Next we would like the 30(b)(6) deposition in connection  
20 with our own Motion for Summary Judgment in this case, which we  
21 think we're entitled to take the deposition of the party that  
22 has in fact sued us.

23 THE COURT: But you haven't filed a Motion, have you?

24 MR. ESSERMAN: No, not yet. But these are  
25 depositions that we would like to take in preparation for that,

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

*732-329-0191*

1 as well as the defense of the Summary Judgment Motion that has  
2 been filed. It's almost --

3 THE COURT: On what issue? Because National Union  
4 has just said on this record that if the conclusion is that the  
5 Debtor has to pay, then National Union understands its  
6 obligation to guaranty and it'll pay. And if the conclusion is  
7 the Debtor doesn't owe the money at this time, then obviously  
8 there's no obligation on behalf of National Union to pay. So  
9 what --

10 MR. ESSERMAN: Your Honor, this is Sandy Esserman. I  
11 think that that may go a long way, and that stipulation on the  
12 record by Mr. Davis on behalf of National Union will go a long  
13 way to what we would have otherwise shown or proven at a  
14 deposition of National Union, so at this time I think that that  
15 probably is not necessary.

16 THE COURT: All right, so you don't need a 30(b)(6)  
17 deposition now.

18 MR. ESSERMAN: I think at this time we don't need a  
19 30(b)(6) deposition in light of that stipulation.

20 THE COURT: All right, Mr. Fisher I want to make sure  
21 that National -- I correctly stated National Union's position.

22 MR. DAVIS: It's Michael Davis, are you asking me?

23 THE COURT: Oh, Mr. Davis, I'm sorry, yes.

24 MR. DAVIS: Obviously I'm hesitating. And you can  
25 sense that. The hesitation is I haven't actually consulted

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329 0191

1 with my client as to whether there's some other defense to the  
2 bond. And I just haven't asked the question. We put up the  
3 defense to the bond that the Debtor doesn't owe the money. And  
4 this Motion that's before Your Honor tests the question, "Does  
5 the Debtor owe the money?" Is there the possibility of another  
6 defense to this bond? None that I've put forward in this  
7 Motion, none that I have in mind, and that's what I can say for  
8 certain.

9 THE COURT: All right, I think if something other  
10 than that, if there is going to be a different defense asserted  
11 --

12 MR. DAVIS: None have been asserted up to now.

13 THE COURT: Okay.

14 MR. ESSERMAN: And, Your Honor, they what's we wanted  
15 to explore in our deposition, that's all. And that's why the  
16 stipulation went or the proposed stipulation --

17 MR. DAVIS: I'm even prepared to turn this the other  
18 way around. I would like the opportunity to consult with my  
19 client. If we decide that we have a defense to the bond, which  
20 it relates to facts, then I would offer my witness. I wouldn't  
21 withhold him. So why don't we just leave that that after  
22 consultation with my client, if the decision is we have a  
23 defense to the bond that's related to our obligation as opposed  
24 to Grace's obligation, then we will put up the witness that has  
25 evidence of that.

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732 329 0191

1 THE COURT: All right. Mr. Esserman, is that  
2 satisfactory?

3 MR. ESSERMAN: Yes, Your Honor.

4 THE COURT: All right. How much time will it take  
5 you to notify Mr. Esserman whether or not there's going to be a  
6 defense?

7 MR. DAVIS: I'd like 10 days.

8 MR. ESSERMAN: That's fine, Your Honor. Like I'd  
9 indicated earlier, Mr. Davis and Ms. Baer and myself and our  
10 firms have cooperated with deadlines and dates here very well,  
11 so that will not be a problem.

12 THE COURT: All right, with respect to Mr. Hughes, it  
13 seems to me that the deposition request for Mr. Hughes is  
14 appropriate if his affidavit is going to be submitted because  
15 he is a fact witness, he has made calculations. And it seems  
16 to me that you can't necessarily just say that you had somebody  
17 else do it and therefore his calculations were correct. He has  
18 independent knowledge and a different understanding of the  
19 Debtors' obligations, and I think his deposition is appropriate  
20 if the affidavits are not going to be withdrawn. If you want  
21 to rely only on Mr. Kelly, I think you can do that, as your  
22 choice I mean not as an evidentiary matter, as your choice you  
23 can do that, but if you're going to use affidavits of record, I  
24 think there's entitlement to a deposition. Limited to 7 hours.  
25 With respect to Dr. Barrett, I'm not sure why this affidavit's

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 filed in this Summary Judgment proceeding if it's not being  
2 used for the summary judgment.

3 MR. DAVIS: Your Honor, it's actually not being --  
4 the Motion has an alternative request for relief. The  
5 alternative request for relief is simply that the case be  
6 stayed pending the resolution of the personal injury procedures  
7 litigation in front of Judge Woland because some of the issues  
8 we think are the same. So we put it in an affidavit by Dr.  
9 Barrett to demonstrate how the issues might be similar or the  
10 same. That's all there is to it. He's only being offered for  
11 the purpose of a scheduling request.

12 THE COURT: All right. Mr. Esserman, he's not being  
13 offered for the Summary Judgment proceedings, therefore his  
14 affidavit not to be used in that connection. So that should  
15 eliminate the need for Barrett's deposition.

16 MR. ESSERMAN: That's fine Your Honor, with that  
17 clarification on the record at this point, if he's not being  
18 offered for the merits, we're not -- there's no need to depose  
19 him at this time.

20 THE COURT: All right, why is it that this should go  
21 forward until Judge Woland is finished however?

22 MR. ESSERMAN: Well, it's very simple, Your Honor.  
23 Regardless of what Judge Woland would decide on the merits, we  
24 have a settlement agreement which sets forth the liquidation  
25 procedure to be used and utilized by the parties, and in fact

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

*732-329-0191*



1 they have done so pre-petition and have done so post-petition.  
2 And we think regardless of what standards Judge Woland may  
3 decide constitutes a claim constitutes a -- doesn't constitute  
4 a claim. We've got a private settlement agreement in which the  
5 parties have agreed in writing as to these issues, and  
6 therefore we think the Judge Woland litigation doesn't  
7 necessarily bear on what has been agreed to between the parties  
8 as to what's a proper claim, what's not a proper claim, and  
9 that in fact is what the bonds were posted for - for payment of  
10 those claims. So that's how we see it.

11 MR. DAVIS: If I may, Your Honor, the settlement  
12 agreements are not classical settlement agreements. They don't  
13 pay this person for this particular claim. What they do is  
14 they set up protocols that set standards, and those standards  
15 are very similar to the standards that Judge Woland is looking  
16 at and those standards will, in the event we have to make  
17 payment or in the event Grace is obligated to make payments to  
18 individuals, those standards will have to be examined. And if  
19 those standards have to be examined, if we get to that point,  
20 then I think whatever Judge Woland might rule on the personal  
21 injury procedures will be pertinent, if not at least  
22 precedential.

23 MR. ESSERMAN: Your Honor, this is Sandy Esserman.  
24 Of course we do disagree with that, but that is something that  
25 we can discuss fuller and in more detail at the Summary

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 Judgment Hearing, when it is set.

2 MS. BAER: Your Honor?

3 THE COURT: Yes.

4 MS. BAER: Your Honor, on behalf of the Debtor we  
5 agree with Mr. Davis. There are a lot of issues here, and in  
6 fact we would anticipate joining in Mr. Davis with respect to a  
7 summary judgment suggesting that this is precisely the thing  
8 that should be held for Judge Woland and will have Judge  
9 Woland's rulings will have an impact on what happens here and  
10 how it goes forward.

11 THE COURT: I'm not sure why. Because it seems to me  
12 this is a contract interpretation issue. What does Judge  
13 Woland's estimate of personal injury liabilities have to do  
14 with whether or not there is a valid contract and people who  
15 are entitled under this agreement to make claims, and the  
16 Debtors' obligation to pay them if, in fact, all of the i's  
17 have been dotted and the t's crossed to get those individuals  
18 paid pursuant to the settlement.

19 MR. DAVIS: The answer is or may be that the  
20 agreement that we're referring to requires that a diagnosis of  
21 a certain condition exists. And we think that's probably very  
22 similar to the which itself is not something that you can  
23 simply say this individual has a diagnosis of this condition.  
24 And particularly when you start looking at the documentation  
25 that's been submitted to be -- that's being put forward as a

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

*732-329-0191*

1 diagnosis, our conclusion is that these things are not  
2 diagnoses. And Judge Woland may very well rule that a  
3 submission by a claimant that says he has this x-ray reading  
4 and it is consistent with this conclusion is, Judge Woland  
5 could rule, not a diagnosis --

6 THE COURT: Yes, but that --

7 MR. DAVIS: In which case, that's precisely the  
8 question under this agreement.

9 THE COURT: Well, that's a question for plan  
10 confirmation purposes though. If this master settlement  
11 agreement set out some different diagnoses, it set out some  
12 different diagnoses. I mean, maybe it'll be the same, I don't  
13 know, but this appears to be a pre-petition contract issue.

14 MR. ESSERMAN: That's exactly what it is, Your Honor.

15 THE COURT: So I'm not sure why his rulings for plan  
16 confirmation purposes have any bearing on what the parties  
17 agreed to pre-petition.

18 MR. DAVIS: Well, if the words are the same and the  
19 standards are the same, and one Judge gives a ruling about what  
20 all that means, wouldn't that be helpful to another Judge?

21 THE COURT: Well, I don't know. I mean the plan may  
22 very well be different from the settlement agreement, and the  
23 obligations under the plan may be different. I recognize the  
24 effect of sealed error. Nonetheless, Debtors in general did a  
25 lot of projections before the sealed error opinion came down,

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 not based on the methodology that sealed error required them to  
2 use and entered into these agreements in what I think was a  
3 different expectation than they are now confronted with. And  
4 so the terms of that contract may very well be different from  
5 the terms of what the plan's going to require based on a ruling  
6 that came into place after these agreements were negotiated.  
7 So I'm not sure that there's any collateral estoppel res  
8 judicata effect because you're talking a pre-petition  
9 settlement agreement in one case, and a plan confirmation  
10 hearing in another.

11 MR. DAVIS: There are actually -- there are four  
12 levels in which Judge Woland's proceeding could be helpful. It  
13 could simply be helpful in that it'll marshal the same evidence  
14 in a way that will save the parties from having to marshal it  
15 twice. And that's the lowest level of assistance. The second  
16 level of assistance is that his decision could be a precedent,  
17 just like any decision of any Court is a precedent, but since  
18 the issues are so similar, the precedent would be a very  
19 helpful precedent. The third possibility is that of a  
20 collateral estoppel, and as to that I'm not prepared to argue  
21 that it will or it won't be, and indeed even a res judicata  
22 effect. But somewhere in that spectrum of assistance from one  
23 Court to the other, we're reasonably confident that if only to  
24 bring about judicial economy, it makes all the sense in the  
25 world to let the one proceeding which is involving a much

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

*732-329-0191*

1 broader universe with a much more elaborate presentation do its  
2 work and provide us all with the benefit of it.

3 THE COURT: Well, I'm not looking to take on work  
4 that I don't need, I just am not sure I see a relationship  
5 between the master settlement agreement process that took place  
6 pre-petition and what Judge Woland has to do to try to figure  
7 out what the future claims liability is for plan confirmation  
8 purposes, and whether somebody has an allowed claim, if he's  
9 going to go there outside the trust distribution. I mean I  
10 don't know, does he have an intent to say what levels of trust  
11 distribution can be paid? Is that what he's looking at? I  
12 haven't even seen a plan, let alone a trust distribution  
13 process set up yet, so I don't, I mean, I don't understand how  
14 this is all fitting together at the moment.

15 MR. DAVIS: I'm certainly not the one who can help  
16 you there. I don't know.

17 THE COURT: Well --

18 MS. BAER: Your Honor, that's all still pending  
19 before Judge Woland. The answer is, frankly, it hasn't been  
20 resolved. None of the procedures have been resolved at this  
21 point. They're fully briefed and waiting for Judge Woland to  
22 hear them.

23 THE COURT: What procedures, Ms. Baer?

24 MS. BAER: With respect to the approach to the  
25 personal injury claims and how they will be handled.

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

*732-329-0191*

1 THE COURT: In the plan.

2 MS. BAER: In the plan.

3 THE COURT: Okay, so he's working --

4 MS. BAER: And frankly, how you get to the plan,  
5 whether there'll be an estimation process before or after. All  
6 of that is before Judge Woland and under consideration.

7 THE COURT: Okay. So if he's looking at both trying  
8 to figure how claims against this estate ought to be allowed,  
9 and he's also looking at trying to estimate future claims, what  
10 does that have to do with a pre-petition contract?

11 MR. DAVIS: From what I understand of the person  
12 injury procedures litigation, one of the issues before Judge  
13 Woland is what constitutes a diagnosis.

14 THE COURT: But that's for plan purposes, not for an  
15 agreement.

16 MR. DAVIS: Well, I understand, but their contract  
17 requires that a diagnosis exist, and I'm not suggesting that I  
18 know that one litigation is going to control the other; that's  
19 not what I'm saying. I'm simply saying it's helpful. And as a  
20 matter of judicial economy, it makes sense, at least in my  
21 mind, to let that litigation, which has a much broader swath,  
22 go forward. And since it's going to go forward and if  
23 nothing else it may very well lead to -- it could lead to a  
24 settlement of this dispute because it may set a standard that  
25 people will look at and say, "That makes sense."

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 MR. ESSERMAN: Your Honor, this is Sandy Esserman.  
2 I'll be brief and hopefully this'll be the last thing I'll say,  
3 but bottom line here, I think one has nothing to do with the  
4 other. This is a pre-petition contract. It's a detailed  
5 contract between the parties as to how the claims are to be  
6 paid, how the claims are to be treated. It has nothing to do  
7 with unliquidated claims against this estate in the future or  
8 otherwise, and I think we'd be able to demonstrate that to you  
9 very clearly. Thank you.

10 THE COURT: All right, well, today all I have is the  
11 request for the discovery, and what I'm going to do, Mr.  
12 Esserman, is ask that you give me an order please that will  
13 permit a deposition limited to 7 hours, of Mr. Hughes, not of  
14 Dr. Barrett since his affidavit will not be used in connection  
15 with the Motion for Summary Judgment, and denying the request  
16 for a 30(b)(6) unless National Union asserts a defense and  
17 notifies you within the next 10 days, in which case then the  
18 designation of a 30(b)(6) witness is approved.

19 MR. ESSERMAN: That'd be fine, Your Honor, and the  
20 parties will work together to schedule those depositions.

21 THE COURT: All right. Can you attach that to a  
22 Certificate of Counsel when you file it, Mr. Esserman, please?

23 MR. ESSERMAN: Yes, I will.

24 THE COURT: All right. Anything else for today? I  
25 guess I should indicate what I signed -- let me see. And then

*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191

1 I'll turn it back to you. Just one minute. I entered orders  
2 on numbers 5, 6 and 7. I am going to enter the order on the  
3 Certificate of Counsel at item #3, if it hasn't already been  
4 docketed, I'm not -- I'm behind in knowing where my staff's  
5 caught up with docketing, so I don't know that. And I don't  
6 remember the status of 1 and 2, I think they're both continued?

7 MS. GALBRATH: That's correct, Your Honor.

8 THE COURT: All right. So is that it?

9 MS. GALBRATH: That's it.

10 THE COURT: Anybody have any housekeeping or other  
11 matters to address? Okay, we're adjourned. Thank you.

12 ALL: Thank you, Your Honor.

13 (Court adjourned)  
14

15 CERTIFICATION

16 I certify that the foregoing is a correct transcript from the  
17 electronic sound recording of the proceedings in the above-  
entitled matter.

18 Lewis P. ...  
19 Signature of Transcriber

5-20-03  
Date

20  
21  
22  
23  
24  
25  
*Writer's Cramp, Inc.*

*Certified Court Transcribers*

732-329-0191